2000 WL 35558807 (Hawai'i Cir.Ct.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Hawai'i,
First Circuit.

CITY AND COUNTY OF HONOLULU, a municipal corporation of the State of Hawaii, Plaintiff,

v.

David Paul COON, Francis Ahloy Keala, Ronald Dale Libkuman, Constance Hee Lau, and Robert Kalani Uichi Kihune, Trustees under the Will and of the Estate of Bernice Pauahi Bishop, deceased; Catherine Mary Banning et al., Defendants.

No. 99-0399-01.
March 17, 2000.

Defendants Lessees' Memorandum in Opposition to Defendants David Paul Coon, Francis Ahloy Keala, Ronald Dale Libkuman, Constance Hee Lau, and Robert Kalani Uichi Kihune, Trustees Under the Will and of the Estate of Bernice Pauahi Bishop, Deceased's Motion for Summary Judgment, or in the Alternative, for Certification Pursuant to Hawaii Revised Statutes § 641-1(b); Declaration of Sally Cravalho; Declaration of Martin Anderson; Exhibits "1" - "10"; Certificate of Service

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Judge: Eden Elizabeth Hifo.

Date: March 28, 2000

Time: 1:30 p.m.

NO TRIAL DATE HAS BEEN SET

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

DOCKETED CASES

DEFENDANTS LESSEES' MEMORANDUM IN OPPOSITION TO DEFENDANTS DAVID PAUL COON, FRANCIS AHLOY KEALA, RONALD DALE LIBKUMAN, CONSTANCE HEE LAU, AND ROBERT KALANI UICHI KIHUNE, TRUSTEES UNDER THE WILL AND OF THE ESTATE OF BERNICE PAUAHI BISHOP, DECEASED'S MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, FOR CERTIFICATION *PURSUANT TO HAWAII REVISED STATUTES § 641-1(b)*

Defendants Lessees CATHERINE MARY BANNING et al., by and through their counsel, Goodsill Anderson Quinn & Stifel and, for the purpose of this Memorandum only, Stanton Clay Chapman Crumpton & Iwamura, submit this Memorandum in Opposition to Bishop Estate's Motion for Summary Judgment, or in the Alternative, for Certification pursuant to Hawaii Revised Statutes ("HRS") § 641-1(b), filed on January 21, 2000.

I. INTRODUCTION: THE CITY STRICTLY COMPLIED WITH ROH CH. 38 AND THE DHCD RULES IN THIS CASE; THEREFORE, THE KUAPA ISLE CASE IS FACTUALLY AND LEGALLY DISTINCT. FURTHERMORE, BISHOP ESTATE IS BARRED ON RES JUDICATA GROUNDS FROM RE-LITIGATING THESE ISSUES HERE.

This suit arises out of the designation for condemnation certain condominium units at The Kahala Beach condominium (hereinafter "Kahala Beach"), under Chapter 38 of the Revised Ordinances of Honolulu (1992) ("ROH") (*see* Exhibit "A" attached to Bishop Estate's Motion) by the City and County of Honolulu (the "City"). Bishop Estate moved for summary judgment claiming that the City violated the mandatory conditions precedent in ROH Chapter 38, thus depriving this Court of jurisdiction to proceed. Bishop Estate also mistakenly contends that the City failed to comply strictly with ROH Chapter 38 and its accompanying Rules for Residential Condominium, Cooperative and Planned Development Leasehold Conversion (1993) (the "Rules") (*see* Exhibit "B" attached to Bishop Estate's Motion), promulgated by the City's Department of Housing and Community Development ("DHCD"). [1]

This Court should deny Bishop Estate's Motion for three reasons: *First*, the City followed Chapter 38 and the Rules to the letter. Bishop Estate contends that "the City did not designate the leased fee interest in specific apartments in Kahala Beach for condemnation at the inception of the condemnation process, as required by ROH §§ 38-2.2 and 5.2." *See* Bishop Estate's Motion, at 2. This contention is factually and legally wrong. The City strictly complied with ROH Ch. 38 and the Rules. *See* Declaration of Sally Cravalho, ¶¶ 12-15, attached hereto.

Bishop Estate is really asking this Court to interpret ROH Chapter 38 and the DHCD Rules to find that the February 2, 1998 preliminary determination by the DHCD Director constitutes the "designation" and that the Director's preliminary determination violates constitutional due process because it fails to identify specifically the condominiums to be taken. In this regard, Bishop Estate completely ignores the February 9, 1998 Public Notice, which specifically named the approved applicants, the condominiums, and their respective percentage in the leased fee interest, as expressly required by Rule § 2-7. In short, Bishop Estate builds its argument on the foundation that this Court is bound by a sister court decision in the Kuapa Isle case; however,

the foundation of Bishop Estate's argument is fatally flawed. The Kuapa Isle proceeding is factually and legally distinct from this case. [2]

Second, Kuapa Isle opposed this nearly identical motion, under a different factual background, by arguing that the City was not required to specifically identify the approved applicants or their respective percentage in the leased fee interest. Defendants Lessees of the Kahala Beach *completely disagree* with that argument, particularly as it applies to the factual background of this case. DHCD Rule § 2-7 expressly requires the City, through published Public Notice in a newspaper of general circulation, to identify the names of the approved applicants, the identity of their respective condominiums, and their respective percentage in the leased fee interest. [3] This was done. In this case, Defendants Lessees submit that the City strictly complied with the plain language of ROH Chapter 38 and the Rules.

Third, this judicial circuit (Judge Aiona) upheld the City's interpretation of the Ordinance through its implementing Rules under the state constitution, prior to the Kuapa Isle case, in *Wong v. City & County of Honolulu*, Civ. No. 98-0782-02 (*see* Order, filed October 30, 1998, attached to the Declaration of Martin Anderson as Exhibit "1"). Bishop Estate's Motion is a thinly-veiled attempt to relitigate the constitutional and statutory interpretation of ROH Chapter 38, after losing this argument in the declaratory relief action. Bishop Estate is barred on *res judicata* grounds from re-litigating these issues because they have been conclusively decided against Bishop Estate by the United States Court of Appeals for the Ninth Circuit and the United States Supreme Court in *Richardson v. City & County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), *cert. denied*, 119 S.Ct. 168 (1998) (attached hereto as Exhibit "2").

Accordingly, Bishop Estate's motion for summary judgment and requests for damages, fees and, alternatively, for certification should be denied.

II. HISTORICAL BACKGROUND OF ROH CHAPTER 38 AND THE RULES

A. ROH Chapter 38 Survived Bishop Estate's Earlier Constitutional Attack in *Richardson v. City & County of Honolulu.*

The City originally passed ROH Chapter 38, in the form of Ordinance 91-95, on December 18, 1991. On the very same day, Bishop Estate filed suit in United States District Court for the District of Hawaii seeking declaratory and injunctive relief. *See Richardson*, 124 F.3d at 1154. Among other things, the federal district court held that ROH Chapter 38 was facially constitutional under the Public Use, Just Compensation, Due Process, and Equal Protection Clauses of the federal and Hawaii constitutions. The district court also certified to the Hawaii Supreme Court the question whether ROH Chapter 38 was preempted by state law. *See id.* at 1155. The Hawaii Supreme Court answered in the negative. *See Richardson v. City and County of Honolulu*, 76 Haw. 46, 868 P.2d 1193 (1994) (attached hereto as Exhibit "3").

Bishop Estate appealed from the federal district court's holding that ROH Chapter 38 passed constitutional muster. The Ninth Circuit Court affirmed, holding that ROH Chapter 38 is constitutional and is premised upon the legitimate public purpose of remedying a failure in the real estate market and strengthening Oahu's economy. *See Richardson*, 124 F.3d at 1158 & 1166. Indeed, quoting Ordinance 91-95 § 1(a), the Ninth Circuit Court reiterated its purpose: "Checking inflation, improving the stability of the economy, and avoiding disadvantageous economic disruptions... to ... Oahu's community."

Bishop Estate sought review before the U.S. Supreme Court. The Supreme Court denied Bishop Estate's application for certiorari, letting stand the district and circuit courts' holdings. *See Richardson v. City & County of Honolulu*, 119 S.Ct. 168 (1998).

B. ROH Chapter 38 and the Rules Survived Bishop Estate's Earlier Statutory Interpretation Attack in *Wong v. City & County of Honolulu.*

Prior to this eminent domain proceeding, Bishop Estate brought a complaint for declaratory relief against the City on February 18, 1998, seeking, *inter alia,* reversal of the City's decisions to designate the Kahala Beach for acquisition, pursuant to the City's interpretation of ROH Ch. 38 and the Rules.[4] *See* Complaint for Declaratory Relief, Civ. No. 98-0782-02, ¶ A, at 46, filed February 18, 1998 (attached hereto as Exhibit "4"). Defendants Lessees of the Kahala Beach were not parties to the declaratory relief action. Therein, Bishop Estate sought the Court's interpretation of the City's process of condemnation under ROH Ch. 38 to govern *all* pending cases. In the complaint for declaratory relief, Bishop Estate specifically raised and sought adjudication of the validity of the designation of the Kahala Beach. *See* Complaint, Civ. No. 98-0782-02, ¶¶ 231-233, 250-252, 254,255, 257, 258, A(1), A(2), and E. Specifically, Bishop Estate sought a determination that "the City's actions and decisions under ROH ch. 38 and the Rules with respect to ... The Kahala Beach are illegal, invalid and unenforceable." *Id.* ¶ 258.

In two separate motions for summary judgment in the declaratory relief action, Bishop Estate specifically raised and litigated the validity of the Rules for "designation... of all or a portion of" the Kahala Beach. *See* Plaintiffs' Motion for Partial Summary Judgment Re *De Facto* "Rules" and for Entry of Final Judgment pursuant to Haw. R. Civ. P. 54(b), at 3 & 19, filed March 11, 1998 (attached hereto as Exhibit "5" *without exhibits*), and Plaintiffs' Motion for Partial Summary Judgment Re Designation of Oceanfront Property and Condominium Land and for Entry of Final Judgment pursuant to Haw. R. Civ. P. 54(b), at 3 & 6, filed March 11, 1998 (attached hereto as Exhibit "6" *without exhibits*). This Court, through Judge Aiona, however, denied Bishop Estate's motions for summary judgment and concluded, among other things, that "KSBE's position... does not accurately reflect a complete and literal interpretation of both HRS chapter 46 and ROH chapter 38." *See* Exhibit "1".

Bishop Estate did not notify Judge McKenna, in the Kuapa Isle case, that these issues had been argued and adjudicated.

III. PRINCIPLES OF STATUTORY CONSTRUCTION COMMAND AN INTERPRETATION CONSISTENT WITH THE CITY'S INTENT.

A. City Ordinances and Implementing Rules Are Presumed Valid.

"Courts apply the same rules of construction to municipal ordinances as they do to statutes, *Waikiki Resort Hotel, Inc. v. City & County of Honolulu,* 63 Haw. 222, 624 P.2d 1353 (1981), and the primary duty of the courts in interpreting statutes is to ascertain and give effect to the intention of the legislature." *Foster Village Community Ass'n v. Hess,* 4 Haw. App. 463, 469, 667 P.2d 850, 854 (Haw. Ct. App. 1983) (citations omitted). "[L]egislative enactments are presumptively valid and 'should be interpreted in such a manner as to give them effect.' " *Richardson,* 76 Haw. at 54-55, 868 P.2d at 1201-02 (citation and some brackets omitted).

It is a cardinal rule of statutory interpretation that the fundamental starting point "is the language of the statute itself.... [W]here the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning." *Id.* at 56, 868 P.2d at 1203 (internal quotation marks omitted). Indeed, the language must be read in the context of the entire ordinance and construed in a manner consistent with its purpose. *See Foster Village Community Ass'n,* 4 Haw. App. at 469, 667 P.2d at 854.

"Courts cannot amend statutes in the guise of interpreting them, and they must presume that the legislature [or the City Council] meant what it said... Only 'unmistakable support in the history and structure of the legislation,' ... can justify a rejection of otherwise unambiguous language...." *Richardson,* 76 Haw. at 57, 868 P.2d at 1204 (citation and some brackets omitted). Departure from the literal construction of a statute is justified *only* "when such construction would produce an absurd ... result and the literal construction in the particular action is clearly inconsistent with the purposes and policies of the act." *Id.* at 60, 868 P.2d at 1207 (citation and internal quotation marks omitted) (ellipses in original). Conversely, a statute should never be

construed in a manner as to be "unreasonable or impracticable." *See Keliipuleole v. Wilson*, 85 Haw. 217, 221-22, 941 P.2d 300, 304-05 (1997).

Even in the context of an ambiguous statute, the Hawaii Supreme Court has held:

> [it] is a well established rule of statutory construction that, where an administrative agency is charged with the responsibility of carrying out the mandate of a statute which contains words of broad and indefinite meaning, *courts accord persuasive weight to administrative construction and follow the same, unless the construction is palpably erroneous.*

Id. at 226, 941 P.2d at 309 (citing *Treloar v. Swinerton & Walberg Co.*, 65 Haw. 415, 424, 653 P.2d 420, 426 (1982)) (emphasis added). Indeed, the practice of according judicial deference to an agency's interpretation of a statute "has peculiar weight when it involves a contemporaneous construction of a statute by the men [or women] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Waikiki Resort Hotel, Inc.*, 63 Haw. at 243, 624 P.2d at 1368 (citation omitted) (brackets added). This is precisely the treatment that this court should afford the judgment of the DHCD of the City and County of Honolulu.

The plain language of ROH § 38-2.2 and Rule § 2-7 requires the DHCD Director, first, to determine whether the acquisition of "all or a portion of" a particular development would effectuate a public purpose. The Director *did so* on February 2, 1998. *See* Exhibit "H-1", ¶ 10, attached to Bishop Estate's Motion and attached hereto as Exhibit "7". Then, under Rule § 2-7, the City must specifically identify the approved applicants, their condominiums, and their respective percentage in the leased fee interest through publication in a newspaper of general circulation. Seven days later, the City *did so* on February 9, 1998. *See* Exhibit "I-1" attached to Bishop Estate's Motion and attached hereto as Exhibit "8". The City strictly complied with Chapter 38 and the Rules. Bishop Estate's contrary contention is erroneous.

B. Bishop Estate Fails to Meet the Standard for Granting a Motion for Summary Judgment.

Summary judgment shall be rendered *only* if "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Hawaii Rules of Civil Procedure ("HRCP"), Rule 56(c). In other words, summary judgment is only appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Shin v. McLaughlin*, 89 Haw. 1, 3, 967 P.2d 1059, 1061 (1998) (citations omitted). It is well settled that, upon reviewing a summary judgment motion, this Court "must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion." *Id.* (citing *Morinoue v. Roy*, 86 Haw. 76, 80, 947 P.2d 944, 948 (1997) (other citations omitted)).

Bishop Estate has not met its burden in the instant Motion. It is indisputable that the City strictly complied with ROH Chapter 38 and the Rules, first, in determining that acquisition of "all or a portion of" the Kahala Beach will effectuate a public purpose and, second, in specifically identifying the condominiums to be acquired through the requisite Public Notice.

IV. ARGUMENT

A. Bishop Estate's Motion Must Be Denied Because This Eminent Domain Proceeding Was Properly and Strictly Implemented in Accordance with ROH Chapter 38 and the DHCD Rules.

Defendants Lessees recognize the well established principle that "government" must comply with "every form and particular required" by a condemnation statute or ordinance. *See In re Widening of Fort Street*, 6 Haw. 638, 646-47 (1887); 1A Julius L. Sackman, *Nichols on Eminent Domain* § 3.03[6][b], at 3-103 (rev. 3d ed. 1998). This principle insures the federal and state

constitutional protection "that no person shall be deprived of... 'property without due process of law[.]' " *In re Widening of Fort Street*, 6 Haw. at 646-47. Bishop Estate recites this principle [5] *ad nauseum* to contend that the City failed to give Bishop Estate specific notice of the condominium units to be designated for acquisition. Put frankly, Bishop Estate's argument is factually and legally groundless.

1. The City specifically identified the approved applicants, their condominiums, and their percentage in the leased fee interest through Public Notice, which is expressly required under Rule § 2-7.

Despite Bishop Estate's contentions to the contrary, it is undeniable that the City strictly complied with the plain language of ROH Chapter 38 [6] and the DHCD Rules.

As required by Rule § 2-2, the Kahala Beach is a horizontal condominium property regime established under the Horizontal Property Act, Chapter 170A, Revised Laws of Hawaii 1955, the predecessor to HRS § 514A (1993). *See* Exhibit "K", attached to Bishop Estate's Motion. In 1997, more than 25 qualified Kahala Beach condominium owner-occupants or more than 50% of the qualified owners-occupants applied to the DHCD in order to purchase their respective leased fee interests. They paid the initial deposit of $1,000, in compliance with Rule § 2-3. The Defendants Lessees named in the instant action were preliminarily approved by the DHCD Director, pursuant to Rules §§ 2-4 and 2-5. [7] *See* Cravalho Declaration, ¶¶ 12-15.

On November 21 and 26, 1997 and on December 3, 1997, the City published a Notice of Public Hearing on Request for Designation of the Kahala Beach for acquisition through the exercise of the power of eminent domain, pursuant to Rule § 2-6 and ROH § 38-2.2(a)(2). *See* Notice of Public Hearing, attached to Bishop Estate's Motion as Exhibit "F-1"; *see also* Cravalho Declaration, ¶ 14. Pursuant to Rule § 2-6 and ROH § 38-2.2(a)(2), the City held a public hearing on December 11, 1997 to determine whether the DHCD Director should designate Kahala Beach for acquisition. *See* Excerpts of Minutes of Public Hearing, Exhibit "G", attached to Bishop Estate's Motion.

On February 2, 1998, DHCD Director Robert Agres, Jr. determined that "*[a]ll or a portion* of the residential condominium land contained in the ... [Kahala Beach ('Project')] is designated for acquisition pursuant to the provisions stated in Chapter 38 ROH." *See* Exhibit "7". Pursuant to Rules §§ 2-3 to 2-7, the DHCD Director also found:

> (a) that the requisite number of applications were received from qualified owner occupants in the Project; (b) that the requisite notice of the public hearing was properly published; (c) that the requisite public hearing was properly held; and (d) of the general content of the testimony presented at the public hearing, [the Director] finds that the acquisition of the leased fee interest in the Project using the power of eminent domain of the City will effectuate the public purpose of Chapter 38 ROH as found and stated by the City Council in Ordinance 91-95.

(Brackets added.) As required by Rule § 2-7, the City thereafter specifically designated the Kahala Beach condominiums to be acquired, through publication in the Star Bulletin on February 9, 1998. *See* Exhibit "8". Rule § 2-7 expressly provides:
Designation of development for acquisition. Following the public hearing, *the director shall determine whether* or not the *acquisition* of the leased fee interests in the development, or a portion of the interests, through the exercise of the power of eminent domain, or by purchase under the threat of eminent domain, and the disposition of such interests as provided by these rules, *will effectuate the public purpose* of Chapter 38, ROH. *Written notice of the decision shall be published* once in a newspaper of general circulation in the City and copies shall be mailed to all approved applicants and all known lessors, sublessors, and other owners or holders of any legal or equitable interests in the leased fee at their respective addresses as shown on the real property tax records of the City and County of Honolulu. *The notice shall include the names of the approved applicants, the identity of their respective condominiums, and the percentage of their leased fee interests.*

(Emphases added.) Rule § 2-7 does not require the preliminary determination or finding by the Director to be in writing; it also does not prohibit a written determination or finding. Rule § 2-7 merely requires the Director to determine that acquisition of the property would effectuate the public purpose of ROH Chapter 38 - as required by the federal and state constitutions. Indeed, the *only* written requirement of the City's designation is the specific published notice in a newspaper of general circulation, which comports with constitutional due process requirements and which contains the information Bishop Estate demands.

In this case, the City, specifically *designated* the condominiums to be converted from leasehold to fee simple interest in the Public Notice on February 9, 1998, just seven (7) days after the Director's preliminary determination. The City "include[ed] the names of the approved applicants, the identity of their respective condominiums, and the percentage of their leased fee interest." In other words, the City *specifically designated* the approved applicants, the condominiums, and their respective percentages in the leased fee interest pursuant to ROH § 38-2.2, as implemented by Rule § 2-7. *See* Exhibit "8".

On January 29, 1999, the City filed its complaint in eminent domain. On September 22, 1999, Bishop Estate *first* moved to dismiss and, alternatively, for an application for interlocutory appeal and a stay, on the grounds that the City was precluded from selling oceanfront property, pursuant to HRS § 46-1.5(16) (1993 & Cum. Supp. 1998). Judge Kevin Chang denied Bishop Estate's motion on January 4, 2000.

At the time of designation of specific units and the filing of the complaint, there has continuously been a sufficient number of owner-occupants, who were originally designated on February 9, 1998, to qualify the Kahala Beach case under ROH Chapter 38. *See* Cravalho Declaration, ¶¶ 15-18. Therefore, the City strictly complied with Chapter 38 and the Rules.

2. Bishop Estate is really arguing that the Director's February 2, 1998 preliminary determination (which is not required to be in writing) is the "designation," rather than the Public Notice of February 9, 1998 (which identified the specific condominium units).

Strangely, Bishop Estate argues that the City did not designate the specific condominiums to be taken. In support, Bishop Estate repeatedly cites to the Director's February 2, 1998 preliminary determination and to the introductory paragraph of the February 9, 1998 Public Notice, which states that "acquisition of the leased fee interest, or a portion thereof in the condominium project known as The Kahala Beach... will effectuate the public purpose of" ROH Chapter 38. *See* Exhibits "7" and "8".

Bishop Estate completely ignores the remaining text of the February 9, 1998 Public Notice, in which the City specifically identified and listed the approved applicants, their respective condominium units by tax map key number, and "their respective percentage of leased fee interest appurtenant to the condominium units ...." The City also specifically stated in the February 9, 1998 Public Notice that the "Leased Fee interest equal to percent of common interest appurtenant to each condominium identified." Accordingly, Bishop Estate's arguments in Sections VI.A-C, at 9-13, of its Motion - that the City did not designate specific apartments, that the City violated ROH § 38-2.2 and 5.2, that the City is attempting to take a common element, that the City cannot designate "the land underlying Kahala Beach," and that the City cannot designate "unspecified apartments in Kahala Beach" - are incorrect and terribly misleading.

Bishop Estate is really arguing [8] that, if the Director makes a written preliminary determination or finding of a public purpose and if the Director titles that document "Designation," that determination must contain the specific condominium units. This clarifies Bishop Estate's true position. Bishop Estate is really seeking an amendment to Rule § 2-7.

Basic principles of statutory construction preclude this court from amending this plain and unambiguous Ordinance or Rule in the guise of interpreting it. "Only 'unmistakable support in the history and structure of the legislation,' ... can justify a rejection of otherwise unambiguous language...." *Richardson*, 76 Haw. at 57, 868 P.2d at 1204 (citation omitted).

Rule § 2-7 plainly and unambiguously provides for the specific identification of the approved applicants, their condominium units, and their percentage in the leased fee interest through published Public Notice. There is absolutely no need to construe

Rule § 2-7 to require the Director to reduce his finding to writing and specifically include the condominium units therein. Indeed, the Director was not even required under Rule § 2-7 to reduce his finding to writing. Requiring such would amend the Rules and add a step, which ROH Chapter 38 and the Rules do not require and which would simply repeat the Public Notice requirement.

Furthermore, Bishop Estate cannot claim that it was denied constitutionally protected due process by being given extra notice of the Director's preliminary determination of public purpose seven days in advance of the required designation by Public Notice. Even the facts of *Housing Finance and Dev. Corp. v. Takabuki*, 82 Haw. 172, 921 P.2d 92 (1996), which depict the State designation process under the Hawaii Land Reform Act, support Defendants Lessees' position that the City strictly complied with Chapter 38 and the Rules. In *Takabuki*, 82 Haw. at 175, 921 P.2d at 95, the State, through the Housing Finance Development Corporation ("HFDC"), initially adopted Resolution 148, designating "all or part of the Haiku Knolls subdivision[.]" HFDC later amended Resolution 148 by adopting Resolution 151, which "designated the aforementioned thirty-two houselots for acquisition of their leased fee interest."

As in *Takabuki*, the determination of public purpose by the Director came first. Then, only seven days later, the City specifically identified the applicants, their condominiums, and their percentage in the leased fee interest. Therefore, the City strictly complied with ROH Chapter 38 and the Rules, as well as the requirements under *Takabuki*. Consequently, Bishop Estate's contentions to the contrary are meritless.

B. Because the Kuapa Isle Proceeding Is Factually and Legally Distinguishable from the Instant Case, this Court Is Not Bound by Judge McKenna's Order.

Bishop Estate relies heavily upon Judge McKenna's decision in the Kuapa Isle case, contending that it is controlling here. Bishop Estate's reliance is *misleading* and *misplaced.*

As a preliminary matter, Defendants Lessees acknowledge the principle of comity announced in *Wong v. City & County of Honolulu*, 66 Haw. 389, 395-96, 665 P.2d 157, 162-63 (1983) (unrelated to the declaratory relief action); however, such comity should only control if the cases are factually and legally similar. Bishop Estate contends that these cases are the same, because the same process was used. As detailed above, it is not that simple.

First, Kuapa Isle opposed this similar motion by arguing that the City was not required to *specifically* identify the approved applicants or their percentage of the leased fee interest. Defendants Lessees of the Kahala Beach *completely disagree* with this argument. Rule § 2-7 expressly requires the City, through Public Notice, to name the approved applicants, to identify their respective condominiums, and to identify their respective percentage in the leased fee interest. Furthermore, in the Kuapa Isle case, "[t]he number of owner-occupants originally named in the July 18, 1995 Public Notice fell below the number required by Chapter 38 .... " Declaration of Sally Cravalho, ¶ 10. The Kahala Beach had no such factual defect - the Kahala Beach case has always had a sufficient number of originally designated owner-occupants. *See id.* ¶¶ 15-18.

Further, Kuapa Isle apparently could not argue that the City strictly complied with Chapter 38 and the Rules by designating the specific names and units in the 1995 Public Notice, because the 1998 condemnation suit did not contain a sufficient number of the originally designated owner-occupants (which were named in the 1995 Public Notice), as arguably required under *Housing Finance and Dev. Corp. v. Takabuki*, 82 Haw. 172, 921 P.2d 92 (1996) and Chapter 38. Kuapa Isle felt compelled to argue that specific designation of units was not required until the condemnation suit was authorized by the City Council, otherwise, Bishop Estate would raise the defense that the number of originally designated owner-occupants had fallen below the required number after the three-year delay. We disagree with this argument but understand the dilemma of Kuapa Isle.

Secondly, Bishop Estate also heavily relies upon the City's so-called admission in the Kuapa Isle proceeding. Again, Bishop Estate's reliance is *misleading* and *misplaced.*

As a preliminary matter, there is no admission in this case that the City did not specifically designate the leased fee interest. In fact, the City specifically designated the leased fee interest in this case. Despite Bishop Estate's contention, a factual admission from another case is not binding in this one. Moreover, Bishop Estate has made a mountain out of a molehill. Paragraph 13 of Exhibit "J" merely states that "[t]he City admits that *by the 1995 DESIGNATION*, the City designated for taking all or a portion of KUAPA ISLE and did not identify for taking any specific apartments in KUAPA ISLE." *See* Exhibit "J", attached to Bishop Estate's Motion. It is apparent from reading the Kuapa Isle "admission" that both Bishop Estate and the City were referring to the preliminary finding by the Director pursuant to Rule § 2-7, which was reduced to writing and titled "Designation by the Director."

The City in no way admitted that it failed *to specifically identify* the leased fee interest in the Public Notice as also required by the plain language of Rule § 2-7. In fact, on January 11, 1998, the City admitted that it specifically "listed the designated leased fee properties to be taken *in the 1995 PUBLIC NOTICE." See* City's Admissions, dated January 11, 1999, attached hereto as Exhibit "9", ¶ 3.

Furthermore, the tenor of Bishop Estate's reliance upon Judge McKenna's Order in the Kuapa Isle case is tainted by the fact that Judge McKenna was *never informed* that Bishop Estate had also challenged the City's interpretation of ROH Chapter 38 and its implementing Rules in the declaratory relief action, Civ. No. 98-0782-02. Bishop Estate failed to bring to Judge McKenna's attention the fact that a parallel action was proceeding before Judge Aiona in the form of the declaratory relief action.

Notwithstanding these factual and legal distinctions, if this Court is inclined to consider applying Judge McKenna's Order to this case, "[t]he rule announced in *Wong*... does not preclude modification of prior rulings in all instances." *The Best Place, Inc. v. Penn Am. Ins. Co.* 82 Haw. 120, 135, 920 P.2d 334, 349 (1996) (citing *Matsushita v. Container Home Supply, Inc.*, 6 Haw. App. 439, 726 P.2d 273 (1986)). This Court has a duty and obligation to exercise independent judgment if it concludes that the prior decision is unsound or based upon incomplete information. Indeed, the Hawaii Supreme Court recently addressed the long-standing principle of *stare decisis*, stating:

we do not lightly disregard precedent; we subscribe to the view that great consideration should always be accorded precedent, especially one of long standing and general acceptance. Yet, it does not necessarily follow that a rule established by precedent is infallible. If unintended injury would result by following the previous decision, corrective action is in order; for we cannot be unmindful of the lessons furnished by our own consciousness, as well as by judicial history, of the liability to error and the advantages of review. *Espaniola v. Cawdrey Mars Joint Venture*, 68 Haw. 171, 182-83, 707 P.2d 365, 373 (1985). As this court has long recognized, *"[w]e not only have the right but are entrusted with a duty to examine the former decisions of this court* and [,] when reconciliation is impossible, to discard our former errors." *Koike v. Board of Water Supply*, 44 Haw. 100, 117-18, 352 P.2d 835, 845, *reh'g denied*, 44 Haw. 146, 352 P.2d 835 (1960); *see also Parke v. Parke*, 25 Haw. 397, 401 (1920) ("It is generally better to establish a new rule than to follow a bad precedent.").

Francis v. Lee Enterprises, Inc., 89 Haw. 234, 236, 971 P.2d 707, 709 (1999) (overruling *Dold v. Outrigger Hotel*, 54 Haw. 18, 501 P.2d 368 (1972) and *Chung v. Kaonohi Center Co.*, 62 Haw. 594, 618 P.2d 283 (1980) and rejecting the tort of tortious breach of contract) (emphasis added).

Cogent reasons exist for this Court not to follow blindly Judge McKenna's Order. This Court should distinguish the Kuapa Isle case on its facts. Indeed, Judge McKenna was not informed about Judge Aiona's decision affirming the validity of ROH Chapter 38 and the DHCD Rules in the declaratory relief action. This Court should hold that the City, in this case, strictly complied with ROH Chapter 38 and the DHCD Rules.

C. Bishop Estate's Motion Is a Thinly-Veiled Attempt to Relitigate the Constitutional and Statutory Interpretation of ROH Chapter 38.

In addition to the fact that Bishop Estate's argument is factually and legally unsupportable, Bishop Estate is barred from re-litigating these arguments by the well established doctrine of *res judicata.* In the declaratory relief action, Civ. No. 98-0782-02, filed February 18, 1998, Bishop Estate specifically challenged ROH Chapter 38 and the Rules, and raised and sought adjudication of the validity of the "designation" of the Kahala Beach.

In particular, Bishop Estate's complaint for declaratory relief specifically challenged the City's compliance with ROH Chapter 38 and the Rules with regard to the Kahala Beach eminent domain proceedings. *See* Complaint, attached as Exhibit "4", ¶¶ 231-233. Seeking an order enjoining the City from initiating or pursuing leasehold conversions under ROH Chapter 38 and expressly naming The Kahala Beach, Bishop Estate claimed that the City misinterpreted ROH Chapter 38 and the Rules and that the City's conduct in condemning the Kahala Beach constitutes "illegal and invalid conduct." *See id.* ¶¶ 250-252. Pursuing a declaration that "the City's actions and decisions under ROH ch. 38 and the Rules with respect to ... The Kahala Beach are illegal, invalid and unenforceable," Bishop Estate also claimed that the City's leasehold conversion proceedings with respect to The Kahala Beach are unconstitutional because the procedures employed by DHCD deprive KSBE of property without due process of law, in violation of Art. I, § 5 of the Hawai'i State Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Id.* ¶¶ 254, 258 Indeed, Bishop Estate specifically sought in the complaint for declaratory relief reversal of the City's decision to "designate The Kahala Beach for acquisition[.]" *Id.* ¶ A(2) (prayer for relief).

In two separate motions for summary judgment filed in the declaratory relief action, Bishop Estate also specifically raised and litigated the validity of the "designation ... of all or a portion of" the Kahala Beach. *See* Plaintiffs' Motion for Partial Summary Judgment, at 3 & 19, filed March 11, 1998 and attached as Exhibit "5" *without exhibits,* and Plaintiffs' Motion for Partial Summary Judgment, at 3 & 6, filed March 11, 1998 and attached as Exhibit "6" *without exhibits.* This Court, through Judge Aiona, denied Bishop Estate's motions for summary judgment, stating in part:

> KSBE's position on this issue does not accurately reflect a complete and literal interpretation of both HRS chapter 46 and ROH chapter 38. Lease to fee conversion as drafted and defined in ROH chapter 38 does not vest ownership of land with the City and County of Honolulu. Moreover, it is quite evident that in reviewing the restriction cited in HRS Section 46-1.5(16) with all other provisions within section 1.5 and remainder of chapter 46 that the restriction was not intended for ROH chapter 38 proceedings....

Order, filed October 30, 1998 and attached as Exhibit "1".

Turning to the doctrine of *res judiciata*, the Hawaii Supreme Court recently stated:

> Res judicata will bar relitigation where (1) the issue decided in the prior adjudication is identical with the one presented in the action in question, (2) there was a final judgment on the merits, and (3) the party against whom *res judicata* is asserted was a party or in privity with a party to the prior adjudication.

Citizens for the Protection of North Kohala Coastline v. County of Hawaii, 91 Haw. 94, 102, 979 P.2d 1120, 1128 (1999) (citations omitted). The Hawaii Supreme Court has also consistently recognized that *res judicata* "precludes the relitigation, not only of the issues which were actually litigated in the first action, but also of all grounds of claim and defense which might have been properly litigated in the first action but were not litigated or decided." *Foytik v. Chandler*, 88 Haw. 307, 315, 966 P.2d 619, 627 (1998) (citations omitted).

In the declaratory relief action before Judge Aiona, Bishop Estate specifically raised the issues of (1) the City's interpretation of the ROH Chapter 38 and the DHCD Rules regarding designation and (2) the validity of the City's designation of the Kahala Beach, in order to settle the law for the seven (7) pending condemnation proceedings. On February 9, 2000, the Circuit Court issued a final judgment on the merits. *See* Final Judgment attached hereto as Exhibit "10". Finally, with regard to the third element, Bishop Estate was the plaintiff in the declaratory relief action. Therefore, Defendants Lessees have properly asserted *res judicata* as a defense to the instant motion. *See In re Herbert M. Dowsett Trust*, 7 Haw. App. 640, 645-46, 791 P.2d 398,

402-03 (Haw. Ct. App. 1990); *Rosa v. CWJ Contractors, Ltd.*, 4 Haw. App. 210, 216, 664 P.2d 745, 749-50 (Haw. Ct. App. 1983).

Bishop Estate may attempt to argue that these were not the exact same issues raised or litigated in the declaratory relief action; however, a review of the complaint for declaratory relief and Bishop Estate's motions for summary judgment in the declaratory relief action (Exhibits "5" and "6") reveal that Bishop Estate raised and sought adjudication of these issues. Moreover, it is well recognized that *res judicata "precludes* the relitigation, not only of the issues which were actually litigated in the first action, but also *of all grounds of claim and defense which might have been properly litigated* in the first action but were not litigated or decided." *Foytik*, 88 Haw. at 315, 966 P.2d at 627 (emphases added). Thus, Bishop Estate is barred from re-litigating the City's interpretation of ROH Chapter 38 and the DHCD Rules regarding "designation" and the validity of the City's "designation" of the Kahala Beach.

D. There are No Meritorious Grounds for Granting an Interlocutory Appeal of the Court's Denial of the Instant Motion.

Anticipating that this court might deny its motion, Bishop Estate further argues that it should be granted leave to make an interlocutory appeal pursuant to HRS § 641-1(b). Such an appeal would be inappropriate under the existing statutory standard.

Under Section 641-1(b), permissive interlocutory appeals may be granted only where "the court may think the appeal is advisable for 'speedy termination of litigation.' " *Stafford v. MTL, Inc.*, 71 Haw. 644, 645, 802 P.2d 480, 481 (1990). This standard will certainly not be met in this case. The court should note that in the prior declaratory relief action, *Wong v. City & County of Honolulu*, No. 98-0782-02, Judge Aiona granted leave for an interlocutory appeal of, among others, the oceanfront issue. The Hawaii Supreme Court, however, dismissed the appeal for lack of appellate jurisdiction and noted that Judge Aiona had **abused** his discretion in permitting such an appeal. There is no reason to believe the appellate court will change its mind when facing a similar appeal in this case. To grant Bishop Estate leave to appeal would be a waste of time and money.

In *Lui v. City & County of Honolulu*, 63 Haw. 668, 234 P.2d 595 (1981), the Hawaii Supreme Court also found that the trial court **abused** its discretion in granting an interlocutory appeal. In that decision, the supreme court noted interlocutory appeals should be granted only in those circumstances where the interests of justice require an immediate appeal. *Id.* at 672, 234 P.2d at 598. The Court expressed concern with the possibility of using interlocutory appeals as a delay tactic for litigants, noting that

> if appeals were allowed from all such rulings (interlocutory rulings) it would be in the power of a defendant, even in a very clear case against him, *to keep the case oscillating between the original and appellate courts almost indefinitely*, to the great expense and annoyance and perhaps *even practical denial of justice to the plaintiff*, to say nothing of the annoyance to the courts and the occupation of their time with trivial matters.

Id. at 671, 234 P.2d at 598 (emphases added) (citation omitted).

In this case, we face the same situation. Bishop Estate has made it clear that it will continue to stand in the way of the City's condemnation of Bishop Estate property regardless of the merit of its position on the issues. In a previous action, Bishop Estate (through its prior counsel, not Warren Price, Esq.) stated boldly that, "KSBE is seeking final judgment in the Declaratory Action and intends to appeal any decision that is adverse to KSBE." Defendant Trustees Memorandum in Opposition to Defendants Nagel Trustees and Defendant Trustee Shelton's Motion to Disqualify Defendant Trustees' Counsel Cades Schutte Fleming & Wright, at 5 (attached as Exhibit "A" to Certain Defendant Lessees' Opposition to Defendant Bishop Estate Trustees' Motion to Dismiss and/or Application for Interlocutory Appeal and a Stay, filed October 5, 1999). Bishop Estate's litigation tactic with regard to Chapter 38, from the very first declaratory relief action filed on December 18, 1991, is to outrun, outspend, and outlast the lessees - into surrender and resignation. Unfortunately, the vast majority of the Defendants Lessees in this case are **elderly**. They do not have a limitless amount of time or resources.

This Court should prevent Bishop Estate's **abuse** of the judicial process and constant delay of this litigation. There is no credible basis for an appeal of the court's denial of this Motion and no equitable basis to stay the City's condemnation process. The City strictly complied with the plain language of ROH Chapter 38 and the Rules. Bishop Estate has tried to confuse the issues by relying heavily upon the Kuapa Isle case. The Kuapa Isle proceeding involved distinct facts and legal arguments, which do not bind this case. Accordingly, this Court should deny Bishop Estate's request for certification.

V. CONCLUSION

Bishop Estate, as movant, has failed to meet its burden to establish a right to summary judgment as a matter of law. As detailed above, the City strictly complied with ROH Chapter 38 and the DHCD Rules. The Kuapa Isle proceeding, upon which Bishop Estate heavily relies, is factually and legally distinct from this case. Furthermore, Bishop Estate is barred from re-litigating these issues on *res judicata* grounds.

Accordingly, Bishop Estate's motion for summary judgment, including Bishop Estate's request for damages, fees and, alternatively, for certification, must be denied, because Bishop Estate's Motion lacks factual and legal merit.

DATED: Honolulu, Hawaii, March 17, 2000.

<<signature>>

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Footnotes

1 In July 1998, the DHCD was abolished and the Department of Community Services (“DCS”) assumed the administration of ROH Chapter 38. This memorandum shall refer to DCS as DHCD.

2 Further, Defendants Lessees were not parties to the Kuapa Isle case.

3 Kuapa Isle did not argue, until its motion for reconsideration, that the City strictly complied with ROH Chapter 38 and the Rules, after its prior “admission” that the City did not identify specific units in the written determination by the director, issued on July 12, 1995 - six days before the designation by public notice, on July 18, 1995, as required by Rule § 2-7. There is no such admission in this case.

4 Indeed, seven (7) cases exist in which the City is ready to proceed under ROH Chapter 38.

5 Bishop Estate also contends that, because this proceeding involves a nontraditional exercise of eminent domain power, ROH Chapter 38 should be *more* strictly construed. This argument begs the question of what strict compliance is - either the government strictly complies or it does not - there is not a heightened level of strict compliance. In this regard, Bishop Estate cites *Uffman v. Housing Fin. & Dev. Corp.*, 70 Haw. 64, 760 P.2d 1115 (1988). *Uffman* does not support a “more strict” compliance rule. *Uffman* just supports strict compliance, *i.e.*, the State cannot acquire a lot that is 4.713 acres in size when the Hawaii Land Reform Act permits acquisition of nothing less than five acres. *See id.* at 66, 760 P.2d at 1116. Bishop Estate's “more strict” argument, therefore, is also unsupported.

6 In particular, ROH § 38-2.2 states in relevant part:

(a) Subject to subsection (b) of this section, *the department may designate all or that portion of a development* containing residential condominium land for acquisition, and facilitate the acquisition of the applicable leased fee interests in that land by the city through the exercise of the power of eminent domain or by purchase under the threat of eminent domain ....

....

(b) This land designated and acquired by the city *may consist of a portion of or the entirety of the land* area submitted to the declaration of condominium property.

(Emphases added.) Despite Bishop Estate's contentions, ROH § 38-2.2 does not expressly require specific designation of the leased fee interest. Bishop Estate's reliance upon ROH § 38-2.2 for this contention is technically incorrect. DHCD Rule § 2-7 outlines the requirement for specific identification.

Additionally, ROH § 38-5.2 states in relevant part: "Within 12 months *after* the designation of the development or portion thereof for acquisition, the department shall facilitate the acquisition of the leased fee interest in the land beneath the development of the City and County of Honolulu ...." (Emphasis added.) Bishop Estate's reliance upon ROH § 38-5.2 for its argument that the City must designate the *leased fee interest* is also strange because ROH § 38-5.2, on its face, states that it applies *after* the designation. Nonetheless, Bishop Estate's substantive reliance upon Section 38-5.2 coincides with the plain language of Rule § 2-7.

7 Bishop Estate does not challenge the City's strict compliance with Rules §§ 2-3, 24, or 2-5.

8 In Bishop Estate's similar motion filed in the Kuapa Isle case, Bishop Estate more clearly articulated that the Director's preliminary determination constitutes the "designation." *See* Exhibit "D-1", at 4, attached to Bishop Estate's Motion. Bishop Estate argued that the Public Notice, as required by Rule § 2-7, was only a "purported designation." Bishop Estate successfully convinced Judge McKenna of this argument by relying upon the City's admission, ¶ 13 of Exhibit "J". However, *there are no admissions in this case*, and Defendants Lessee are arguing that the City specifically designated the approved applicants, the condominiums, and their percentages in the leased fee interest in the February 9, 1998 Public Notice.

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